ship upon learning that it was laden with contraband of war. *Sibbery* v. *Connelly*, 22 T. L. R. 174 (K. B. D. Dec. 18, 1905). This was no case of actual impossibility, nor can any implied intention be found; but conditions had totally changed since making the contract, and a reasonable man would have been justified in declining to assume the increased risk.[8]

RECENT CASES.

ADVERSE POSSESSION — WHO MAY GAIN TITLE — POSSESSION UNDER CLAIM OF RIGHT AGAINST ALL BUT SOVEREIGN. — Public land was granted to a railroad company under which the defendant claims as grantee. Subsequently the plaintiff entered upon the land, intending to acquire title from the government under the Timber Culture Act. He remained in possession until the statute of limitations had run, and then brought an action to quiet his title. *Held*, that to constitute adverse possession a claim of right against all but the government is sufficient, and the plaintiff's title is therefore good. *Blumer* v. *Iowa Land Co.*, 105 N. W. Rep. 342 (Ia.).

For a discussion of the principles involved, see 18 HARV. L. REV. 380.

AGENCY — DISCLOSED PRINCIPAL'S RIGHTS AND LIABILITIES UNDER AGENT'S CONTRACTS WITH THIRD PERSONS. — A document signed by the defendants stated that as deacons of a church they invited the plaintiff to the pastorate at a specified salary. "We regret to state that our present income will not warrant anything higher now, but," etc. The plaintiff, upon acceptance, acted as treasurer, and out of the surplus of funds on hand paid himself his salary. *Held*, that, as on the face of the contract the plaintiff had pointed out to him the fund out of which he was to be paid, the defendants are not personally liable. *Morley* v. *Makin*, 22 T. L. R. 7 (Eng., K. B. D., Oct. 26, 1905). See NOTES, p. 456.

ANIMALS — DAMAGE TO PERSONS BY ANIMALS — WHAT AMOUNTS TO KEEPING AND HARBORING A DOG. — The plaintiff, who was bitten by a vicious dog at large upon the street, brought action against the defendant. The defendant was not the owner of the dog, but permitted her porter, who worked upon her premises, to keep it thereon, both having knowledge of its vicious propensities. The jury found for the plaintiff. *Held*, that the question whether the defendant kept or harbored the dog was properly submitted to the jury, and that the verdict will not be disturbed. *Barklow* v. *Avery*, 89 S. W. Rep 417 (Tex., Civ. App.).

Even at common law one who keeps or harbors a vicious dog, knowing its vicious propensities, seems to be responsible for its actions, although he is not the owner. *M'Kone* v. *Wood*, 5 C. & P. 1; *Bundschuh* v. *Mayer*, 81 Hun (N. Y.) 111. But now this liability is quite generally imposed or defined by statute. Yet precisely what constitutes "keeping or harboring" has been usually left to the courts to define. In a few cases the language used by the court would sustain the rule that merely to permit the dog to remain upon the premises constitutes a "harboring." *Jacobsmeyer* v. *Poggemoeller*, 47 Mo. App. 560. But the better and generally accepted rule seems to be that the question is one of fact for the jury, who are to decide it in the light of all the evidence. *Whittemore* v. *Thomas*, 153 Mass. 347. And the test usually given them is that the dog must have been in the possession or control of the defendant as a domestic animal. *Cummings* v. *Riley*, 52 N. H. 368. Or, if kept by servants or agents, the dog must be kept in some sense for the defendant's benefit. *Baker* v. *Kinsey*, 38 Cal. 631; *Collingill* v. *City of Haverhill*, 128 Mass. 218.

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[8] See Walsh *v.* Fisher, 102 Wis. 172, 179.

BANKS AND BANKING — COLLECTIONS — CHECK SENT TO DRAWEE BANK FOR COLLECTION. — The plaintiffs deposited a check with the defendant bank for collection, and the latter forwarded it in accordance with the usual custom of the locality to the drawee bank. In payment, the latter sent New York exchange, which owing to its subsequent insolvency was not honored. *Held*, that the custom is unreasonable and will not relieve the defendant from liability for any damages resulting from its action. *Farley National Bank* v. *Pollock & Bernheimer*, 39 So. Rep. 612 (Ala.).

Whether the collecting bank is regarded as an agent, or, according to a sounder view, as a trustee of the claims against the debtor for the benefit of the depositary bank, the Alabama decision is clearly right. Under either relation, one of the depositary bank's duties to the depositor is to select its correspondent with due care. *German Nat. Bank* v. *Burns*, 12 Col. 539. Though the drawee bank is not liable to the holder of an uncertified check, its adverse interests to the drawer make it probable that the duties following presentment and dishonor of a check drawn on itself will not be diligently exercised; therefore it is not a suitable correspondent to select for that purpose. *American, etc., Bank* v. *Metropolitan, etc., Bank*, 71 Mo. App. 451; *contra*, *Indig* v. *National City Bank*, 80 N. Y. 100. And since such selection is unreasonable, custom will not excuse it. *American, etc., Bank* v. *Metropolitan, etc., Bank, supra; Prideaux* v. *Criddle*, L. R. 9 Q. B. 455. A second ground for holding the defendant liable is that a bank has no authority to accept payment of a bill sent for collection in any form but money. *Fifth National Bank* v. *Ashforth*, 123 Pa. St. 212. If a bank does so accept, the depositor should have the right to treat the transaction as a collection and to charge the bank as a debtor. *Fifth National Bank* v. *Ashforth*, *supra; contra*, *Russell* v. *Hankey*, 6 T. R. 12. For a discussion of the general relationship on collection, see 18 HARV. L. REV. 300.

CARRIERS — DISCRIMINATION AND OVERCHARGE — CARRIER ACTING AS DEALER. — The Chesapeake and Ohio Railroad contracted to deliver coal at the rate of $2.75 a ton to the New Haven Railroad. This price was less than the cost of the coal at the mines plus the published rates of transportation of the Chesapeake and Ohio from the mines to the point of delivery. *Held*, that as this difference must be considered a rebate from the published tariff, the contract is violative of the prohibitions of the Interstate Commerce Act against personal discrimination; and decreed that the Chesapeake and Ohio be perpetually enjoined from taking less than the rates fixed in its published tariff, by means of the purchase and sale of coal. *New York, etc., R. R.* v. *Interstate Commerce Commission*, U. S. Sup. Ct., Feb. 19, 1906. See NOTES, p. 453.

CHARITIES — RIGHTS AND LIABILITIES OF CHARITABLE ORGANIZATIONS — TO WHAT CHARITABLE ORGANIZATIONS THE EXEMPTION FROM LIABILITY FOR NEGLIGENCE EXTENDS. — The defendant university was by its charter required to hold all its property solely for the purpose of the education of all fit applicants, and not for its own profit. The plaintiff, who had paid a tuition fee to become a student at the defendant university, lost his eye through the negligence of a professor of the defendant. *Held*, that the defendant, having been chartered solely for an object within the Charitable Uses Act, is not liable for the negligence of its servants. *Parks* v. *Northwestern University*, 75 N. E. Rep. 991 (Ill., Sup. Ct.).

The general rule is that charitable corporations are not answerable for the negligence of their servants. For a discussion of the application of this rule to the case of hospitals, see 16 HARV. L. REV. 530. The present case applies to this rule the definition of a charity found in the Charitable Uses Act. As this definition is broad in its scope, it will hardly meet with approval from courts which have shown a tendency to limit the rule. *Cf. Chapin* v. *Holyoke Y. M. C. A.*, 165 Mass. 280. For an article opposing the adoption of the definition applied in the principal case, and reviewing the decisions in point, see 1 LAW 645.

CONFLICT OF LAWS — TESTAMENTARY SUCCESSION — VALIDITY OF TRUST PERFORMABLE OUTSIDE OF JURISDICTION OF ITS CREATION. — A testator, domiciled in New York, bequeathed property to the Bishop of Utah and his successors in office, in trust to acquire land in Utah and to erect a church and rectory thereon to become the property of the Protestant Episcopal Jurisdiction. By the law of Utah the bequest is void because of the indefiniteness of the beneficiaries; by the law of New York, where the common law has been changed by statute (Laws 1893, c. 701), the trust is valid. *Held*, that the law of Utah governs and the bequest is therefore invalid. *Mount* v. *Tuttle*, 34 N. Y. L. J. 1375 (N. Y., Ct. App., Jan., 1906). See NOTES, p. 457.

CONSTITUTIONAL LAW — SPECIAL LEGISLATION — ANNEXATION OF CITIES. An act passed by the Pennsylvania Assembly provided that "when two cities are contiguous and in the same county, the smaller may be annexed to the larger." It was further provided that, "for the purposes of this act, cities separated by a stream, river, or highway shall be included under the term 'contiguous.'" It appeared that the cities of Pittsburg and Allegheny, separated by the Allegheny River, were the only two contiguous cities in the state. The city of Pittsburg instituted proceedings to annex the city of Allegheny in accordance with this act. The plaintiffs, citizens and tax-payers of Allegheny, brought a bill to restrain such proceedings on the ground that the act was in violation of the provision of the state constitution prohibiting special laws regulating the affairs of cities. *Held*, that the plaintiffs are entitled to the injunction. *Sample* v. *Pittsburg*, 62 Atl. Rep. 201 (Pa.).

The court found that the act applied to a special existing state of facts. The clause that cities are contiguous although separated by a river reinforced their position. If an act can apply to but one section in the state, within the range of probabilities, the legislation is special. *State* v. *County Court of Jackson Co.*, 89 Mo. 237. When, however, the act is general in its scope, the fact that there is only one situation to which it can apply at the time it is passed does not make it unconstitutional when there is probability that there will be other situations which will come under its terms. *Heinzinger* v. *State*, 39 Neb. 653. In view of the defendants' answer that there are two towns which are likely to become contiguous cities in the near future, the court might well have construed the act prospectively, and held it constitutional. *Cf. Treanor* v. *Eichhorn*, 74 Hun (N. Y.) 58. The court, however, considered this a remote contingency. For a full discussion of the principles involved and the wisdom of such a constitutional provision, see 18 HARV. L. REV. 588.

CONSTITUTIONAL LAW — VESTED RIGHTS — MODE OF SETTLING BILL OF EXCEPTIONS. — Before the plaintiff's bill of exceptions was settled the trial judge died. As the law then stood, the excepting party was entitled to a new trial, but a statute, enacted while the suit was pending, provided that any judge of the supreme court might allow exceptions in a case tried by a deceased judge. *Held*, that as the plaintiff has no vested right to a new trial under the law as it stood at the time of the trial, the act may apply to the pending case. *Johnson* v. *Smith*, 62 Atl. Rep. 9 (Vt.).

Despite a contrary, unsatisfactory Michigan decision, this case seems clear. See *People* v. *Judge*, 40 Mich. 630. The denial of the existence of vested rights in matters relating to the enforcement of a cause of action is a commonplace of constitutional law. A consideration of the nature of a bill of exceptions renders obvious that it involves a matter pertaining to the remedy and not to the right. *Mason* v. *Phelps*, 48 Mich. 126. Such a bill is a formal statement by which objections to rulings are raised before an appellate court. The bill should be settled by the presiding justice; but when he is incapacitated or has died before settlement, various rules prevail. See 3 ENCYCL. PR. & PROC. 455. In some states, as was the practice in Vermont derived from England, a new trial is granted as of course. Others allow the successor in office of the ex-judge to settle the bill; while in a few states a transcript of the stenographer's minutes is used. In changing the prevailing method of adjustment by permitting some

other judge to allow the exceptions, the very right of appeal sought by the exceptant is secured and he cannot insist on a fortuitous new trial. Similarly, a statute abolishing the right to a second trial to a losing party in existing causes of action has been sustained. *People ex rel. Long* v. *District Court*, 28 Col. 161. In fact, the so-called right of appeal itself, even in cases that have gone to judgment, is a privilege that may be abrogated in the absence of express constitutional inhibitions. See *Ryan* v. *Waule*, 63 N. Y. 57; *Railroad Co.* v. *Grant*, 98 U. S. 398.

CONSTRUCTIVE TRUSTS — EFFECT OF STATUTE OF FRAUDS — CONVEYANCE INTER VIVOS UPON ORAL TRUST. — A purchased land, taking the deed in the name of B, who promised verbally to hold the land in trust for C. After A's death B's devisee refused to carry out the trust. *Held*, that C can enforce the trust against B's devisee. *Smoke* v. *Smoke*, 11 Va. L. Reg. 747 (Va., Cir. Ct., Nov., 1905).

This decision was based upon the ground that the grantee, having title to land not rightfully his own, became constructive trustee for the intended beneficiary, thus taking the case out of the Statute of Frauds. Such a holding can scarcely be supported on principle or authority. *Cf. Campbell* v. *Brown*, 129 Mass. 23. To hold that the trustee's mere refusal to perform his oral agreement transforms the express *cestui* into a constructive *cestui* would work a substantial abrogation of the Statute of Frauds. Any constructive trust arising out of such a refusal should be in favor of the settlor or his heirs, and such is the English rule. *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196. The corresponding American rule, while recognizing no constructive trust, allows the settlor to recover the value of the land conveyed. *Moore* v. *Horsley*, 156 Ill. 36; *Nugent* v. *Teachout*, 67 Mich. 571. Where, however, a devise of land is made upon oral trust, the trust is enforceable in favor of the intended *cestui*. *Gilpatrick* v. *Glidden*, 81 Me. 137 In support of this palpable violation of the Statute of Frauds it has been urged that a constructive trust in favor of the heirs would defeat the devisor's purpose. As the settlor in the present case had died, the above analogy, though anomalous, may afford some support for the decision.

CONTRACTS — DEFENSES: FRAUD — RECOVERY BY SERVANT GUILTY OF WILFUL BREACH NOT GOING TO ESSENCE OF CONTRACT. — The plaintiff in his capacity of manager of the defendant's farm intentionally sent in garbled accounts of his running expenses. *Held*, that the plaintiff cannot recover, on the ground that "a wilful default in the performance of a stipulation not going to the essence of the contract bars a recovery." *Sipley* v. *Stickney*, 76 N. E. Rep. 226 (Mass.).

Most courts refuse to give a servant who has committed a wilful breach going to the essence of his contract of service any compensation, either on the contract or on a *quantum meruit*. *Lantry* v. *Parks*, 8 Cow. (N. Y.) 63; *contra*, *Britton* v. *Turner*, 6 N. H. 481. In view of the fact that a very slight act of dishonesty is ordinarily much more dangerous to the future of the contract than any other sort of default, even though wilful, these courts generally make it a rule that even the least dishonesty necessarily so goes to the essence of the contract as to bar recovery. *Libhart* v. *Wood*, 1 Watts & S. (Pa.) 265. It would seem, therefore, that the Massachusetts court, which supports the majority view, might properly on this reasoning have refused redress. *Cf. Homer* v. *Shaw*, 177 Mass. 1. But the opinion expressly waives this possibility, and bases itself squarely on the ground that the breach, though non-essential, nevertheless, being wilful, precludes recovery. The farthest that previous decisions have gone is to refuse wages to a servant discharged for an act of wilful disobedience which, though essential, did not injuriously affect the future of the contract. *Jerome* v. *Queen City Cycle Co.*, 163 N. Y. 351; *Beckman, Jr.* v. *Garrett*, 66 Oh. St. 136. The present decision goes a dangerous distance beyond these; and it is doubtful whether the Massachusetts court would follow its doctrine if the breach, though intentional, were absurdly trivial. The materiality of the servant's breach, being the criterion of his value, should furnish the primary test for the master's

liability, so that in some cases, notably where the element of dishonesty is present, the servant's motive may play an important part in determining the materiality of his breach. See *Shaver* v. *Ingham*, 58 Mich. 649.

CONTRACTS — DEFENSES — IMPOSSIBILITY. — The plaintiff, a seaman, contracted with the defendant to go on a voyage from Glasgow to Hong-Kong and return, ports in any rotation. After proceeding part of the way on the voyage, the plaintiff learned that the vessel was laden with contraband of war and bound for a Japanese port. *Held*, that he was justified in refusing to go on. *Sibery* v. *Connelly*, 22 T. L. R. 174 (Eng., K. B. D., Dec. 18, 1905). See NOTES, p. 462

CONTRACTS — SUITS BY THIRD PERSONS NOT PARTIES TO CONTRACT — CITIZENS SUING ON CONTRACT TO SUPPLY CITY WITH WATER. — A water company, the defendant's predecessor, made a contract with a village to supply the residents thereof with water at rates not exceeding a fixed maximum. *Held*, that a resident may sue in equity to restrain the defendant from collecting a higher rate. *Pond* v. *New Rochelle Water Company*, 34 N. Y. L. J. 1257 (N. Y., Ct. App., Jan. 9, 1906).

In New York the *Lawrence* v. *Fox* doctrine, which was originally restricted to cases where the promisee was under some legal or equitable obligation to the third person, has been extended to cases of mere moral duty, such as a parent owes to a child, or a husband to his wife. See 15 HARV. L. REV. 767, 780. This case makes a further extension in holding that the interest which a municipality has in providing its inhabitants with water at reasonable rates is sufficient to entitle an inhabitant to sue on a contract between the municipality and a water company. But see *Wainwright* v. *Queens County Water Co.*, 78 Hun (N. Y.) 146, 152. Yet in New York, as elsewhere, a third party acquires no right to sue merely because he is incidentally benefited by the contract. *Durnheer* v. *Rau*, 135 N. Y. 219. And courts hold almost universally that a contract between a city and a water company to furnish water at a certain pressure is intended for the benefit of the community as a whole and not of individuals; so that one whose house is destroyed by fire through the failure of the water company to provide the requisite amount of pressure has no action on the contract. See 15 HARV. L. REV. 767, 784; 13 *ibid.* 226. In the principal case it is less difficult to contend that the contract was intended to benefit the individual consumers. See *Allen & Currey Mfg. Co.* v. *Shreveport Water Works Co.*, 113 La. 1091; *contra*, *Cleburne Water Co.* v. *City of Cleburne*, 13 Tex. Civ. App. 141, 143.

CRIMINAL LAW — GROUNDS FOR GRANTING NEW TRIAL — READING OF NEWSPAPER BY JURORS. — In a trial for murder the jury returned a verdict of guilty in the first degree. The defendant sought a new trial on the ground that several jurors during the trial had read a newspaper article upon the case exhibiting a strong bias against him. *Held*, that though the reading of the article was misconduct, it furnishes no ground for a new trial, since the rest of the record so clearly establishes the defendant's guilt that whether the jury read the article or not they could have returned no other verdict. One justice dissented. *State* v. *Williams*, 105 N. W. Rep. 265 (Minn.).

In general an appellant, to obtain a reversal, must show not only that error occurred, but that he was substantially prejudiced thereby. *Milby* v. *United States*, 120 Fed. Rep. 1. The fact that one or more jurors during a trial for felony read newspaper comments on the crime or case is generally conceded to be misconduct. *Moore* v. *State*, 36 Tex. Cr. App. 88. Yet, if it appears that the comments were either favorable to the appellant or not of a nature to prejudice the jury against him, this will not be ground for reversal. *United States* v. *Reid*, 12 How. (U. S.) 361. If, however, the nature of the article read was such as might have aided the jury in arriving at their verdict, the great weight of authority is that a new trial should be granted. *Mattox* v. *United States*, 146 U. S. 140; *People* v. *Stokes*, 103 Cal. 193. It seems just that where the rest of the record independently establishes the defendant's guilt beyond a reasonable doubt, there should be no reversal for error as to

a point of law. *Milby* v. *United States*, *supra*. But whether a similar rule should apply to prejudicial misconduct by the jury is questionable, on grounds of public policy. By the weight of authority, at any rate, prejudicial misconduct is absolute ground for reversal. *Commonwealth* v. *Landis*, 12 Phila. (Pa.) 576.

CRIMINAL LAW — SENTENCE — UNAUTHORIZED FIXING OF MAXIMUM TERM OF IMPRISONMENT. — The petitioner was convicted under an Indeterminate Sentence Act, requiring the court to fix the minimum term while the maximum is provided by law. The trial court, however, besides fixing a minimum term, added a maximum below the statutory period. After the expiration of this maximum period the prisoner brought *habeas corpus*. *Held*, that the petitioner is subject to the statutory maximum, and the writ therefore does not lie. Two judges dissented. *Ex parte Duff*, 105 N. W. Rep. 138 (Mich.).

A writ of *habeas corpus* is properly brought for the detention of a prisoner after his term of imprisonment has expired. *Ex parte Lange*, 18 Wall. (U. S.) 163. The Michigan court has already held that the act in question does not authorize the court to fix a maximum term. *In re Campbell*, 101 N. W. Rep. 826. The maximum provided by law automatically operates as part of the sentence. The question therefore is: did the imposition of the unauthorized maximum operate as a substitution for the statutory maximum? The weight of authority and the current tendency are that a sentence is valid as to the extent of the court's authority, and a nullity as to the excess. *In re Taylor*, 7 S. Dak. 382. A prisoner improperly sentenced below the statutory minimum cannot procure an immediate discharge on a writ of *habeas corpus*. *State* v. *Klock*, 48 La. Ann. 67; but see *Ex parte Berner*, 62 Cal. 524. Nor will it issue for an excessive sentence. *People* v. *Baker*, 89 N. Y. 460; *United States* v. *Pridgeon*, 153 U. S. 48, 62. Therefore, in the present case, immediately after sentence, the prisoner's only remedy would have been a writ of error, resulting simply in a remanding of the judgment so as to strike out the unauthorized maximum, a result of no practical benefit to the prisoner. Nor should a different result be reached after the inadequate sentence is served. The unauthorized maximum is clearly severable as a surplusage from the proper minimum, and the prisoner's rights are to be determined as though no maximum were fixed.

DEATH BY WRONGFUL ACT — DEFENSES TO STATUTORY LIABILITY — LIMITATION OF ACTION. — *Held*, that under a statute which allows a personal representative an action for the wrongful death of the deceased, the cause of action accrues, not upon the death, but upon the appointment of the administrator. *Crapo* v. *The City of Syracuse*, 76 N. E. Rep. 465 (N. Y.). See NOTES, p. 458.

DECEIT — PARTICULAR CASES — NEGLIGENTLY DEALING WITH WORTHLESS NOTE. — The defendant, after forging a promissory note with intent to defraud any one to whom it should come, negligently left it where a wrongdoer found it. Later the wrongdoer put it into circulation. The plaintiff, a *bona fide* purchaser, brought an action of tort. *Held*, that he has no cause of action. *Costello* v. *Barnard*, 34 Banker and Tradesman, 195 (Mass., Sup. Ct., Jan. 8, 1906).

The first requisite of deceit is a representation by the defendant to the plaintiff or to the class to which the plaintiff belongs. See *Polhill* v. *Walter*, 3 B. & Ad. 114. Here the defendant was merely preparing to make a representation to the plaintiff. In a somewhat analogous case of libel, if a defendant should carelessly leave a defamatory document on his desk where a third person might reasonably be expected to see it, and some third person did see it, that might be a sufficient publication. See ODGERS, LIBEL AND SLANDER, 4th ed., 156. But in a case like the present, it is far more difficult to maintain that the defendant should be held liable, if some wilful intervening person should take active measures to lay before the plaintiff a representation which the defendant himself was merely preparing to make. And an action for negligence, *eo nomine*, could not lie here, because the negligence was not the proximate cause of the damage. That a general fraudulent intent accompanies the negligence ought not to create an absolute liability. If A, after loading a gun

with intent to shoot B, negligently leaves it where C finds it, and if C then wilfully shoots B, A could scarcely be held liable to B. But *cf. Meade* v. *C., R. I. & P. Ry. Co.*, 68 Mo. App. 92, 101.

DEEDS — EXCEPTIONS AND RESERVATIONS — RESERVATION OF EASEMENTS: OPERATION AS RESTRICTIVE AGREEMENT. — A deed poll contained the clause: "A passageway is to be kept open and for use in common between the two houses ten feet in width, five feet of said passageway to be furnished by . . . (the grantee) and five feet by me from land lying east of the land here conveyed." There was no existing passageway. An action was brought after the grantor's death for breach of a warranty against incumbrances in a later deed. *Held*, that the clause, though not creating a legal easement by way of exception or by reservation beyond the grantor's life, is a restrictive agreement perpetually enforceable in equity and therefore is an incumbrance. *Bailey* v. *Agawam Nat. Bank*, 76 N. E. Rep. 449 (Mass).

According to most American decisions, the clause would create a legal easement in fee in the grantor, though "heirs" be not mentioned. 13 HARV. L. REV. 404; *Winthrop* v. *Fairbanks*, 41 Me. 307. Massachusetts, having denied the creation by exception or reservation of an easement for longer than the grantor's life, later introduced a questionable modification allowing the exception in fee of a way already located. *White* v. *N. Y., etc., Rd. Co.*, 156 Mass. 181. The present novel decision is a further advance, but by a more scientific route, toward desirable uniformity with the prevailing view. Although not decided in this case, it would seem also that language of exception, reservation, or regrant should be construed as an agreement by the grantee. *Cf. Case* v. *Haight*, 3 Wend. (N. Y.) 632. A restrictive agreement is, of course, enforceable against subsequent grantees with notice. *Tulk* v. *Moxhay*, 2 Ph. 774; see 17 HARV. L. REV. 174. And since recording acts provide sufficient constructive notice, it appears that reservations of rights in granted property are fully effectual in Massachusetts, though some of the remedies must be sought in equity. The case must be regarded as overruling the effect of former decisions denying equitable relief, after the immediate grantor's death, upon clauses which are, to say the least, distinguishable with great difficulty from that in question. *Cf. Ashcroft* v. *Eastern Rd. Co.*, 126 Mass. 196; *Simpson* v. *Boston, etc., Rd.*, 176 Mass. 359.

EVIDENCE — CONFESSIONS — NECESSITY FOR CORROBORATION. — The defendant was charged with forging a warranty deed and, while under arrest, made a full written confession of his guilt. At the trial no independent evidence whatever was given to prove the forgery. *Held*, that the confession alone was insufficient to sustain a conviction. *Blacker* v. *State*, 105 N. W. Rep. 302 (Neb).

The view of the early common law was that a confession, being so strongly against interest, was the most reliable kind of evidence. See *Attorney-General* v. *Mico*, Hard. 137, 139. It is reasonably clear that until the last century extrajudicial confessions in England were received in evidence without corroboration. *Cf. Hulet's Trial*, 5 How. St. Tr. 1186, 1189. This is, perhaps, the present English rule, except in cases of homicide. *Rex* v. *Unkles*, Ir. R. 8 C. L. 50, 58; see 3 WIGMORE EV., § 2070, note 4. While the point is still unsettled in a few American jurisdictions, the great majority of courts, probably influenced by a desire to guard against false confessions and to increase the humanity of the criminal code, will not receive an extrajudicial confession without corroborative evidence. Of these, some hold that any related facts consistent with the truth of the confession are sufficient to support it. *Bergen* v. *People*, 17 Ill. 426. The greater number require independent evidence of the *corpus delicti* itself. *Johnson* v. *The State*, 59 Ala. 37. A few require evidence not only to prove the criminal act, but to show the defendant's connection therewith. *Harris* v. *The State*, 28 Tex. App. 308. The first of the three views just noted seems preferable because it lets in valuable evidence without unnecessary caution.

EVIDENCE — DYING DECLARATION — SUBJECT-MATTER OF DECLARATION. — The defendant, a railroad brakeman, was prosecuted for the murder of

a young boy whom he shot from the caboose of a train. His defense was that having been struck by a stone he shot without seeing any one, for the purpose of scaring the person who had thrown the stone. The government introduced the deceased boy's dying declaration that he had not thrown anything at the train nor incited anybody to do so. *Held*, that the declaration is admissible. *Burroughs* v. *United States*, 90 S. W. Rep. 8 (Ind. T.).

Like other exceptions to the rule against hearsay evidence, the courts have treated rigorously dying declarations. This exception has now become limited to cases of criminal homicide where the cause of the declarant's death is the subject-matter of the indictment. 2 WIGMORE, EV., 1st ed., §§ 1432, 1433. How closely the declaration must relate to "the circumstances of the death" has not been clearly defined. The tendency of the courts has been to construe this phrase strictly to mean the immediate circumstances of the death. An extreme example was the exclusion of a declaration as to an occurrence of three hours before the fatal injury. *People* v. *Smith*, 172 N. Y. 210. In general the courts have excluded statements as to prior transactions. *State* v. *McKnight*, 119 Ia. 79. If the declaration in the present case related to any past transaction, according to authority it would be inadmissible; but fairly construed it relates to "immediate circumstances" so that the ruling seems in accordance with precedent. *State* v. *Parker*, 172 Mo. 191. Indeed courts might well admit declarations as to prior transactions provided they concerned facts relating to the declarant's death, for such declarations seem within the real reason of the exception, namely, the difficulty of securing other evidence. See *State* v. *Petsch*, 43 S. C. 132.

FEDERAL COURTS — JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP — JOINT ACTIONS. — The plaintiff's intestate was killed by a train operated by an Alabama corporation. The plaintiff sued the company and the conductor and engineer of the train jointly on the ground that the two last-named persons were guilty of negligence in managing the train. His action against the company was based solely upon the latter's liability as principal for the acts of its servants. The plaintiff, the conductor, and the engineer were all citizens of Tennessee; the company had been incorporated in Alabama. A federal statute provided that when there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, it may be removed to the federal courts. *Held*, that this cause is not removable from the state to the federal courts, even though the actions against the company and against the officials were not properly joined, because by electing to sue the defendants jointly, the plaintiff has determined the character of the controversy, and, for purposes of jurisdiction, it will be considered joint. *Alabama, etc., Ry. Co.* v. *Thompson*, U. S. Sup. Ct., Jan. 2, 1906.

For a discussion of a similar case, see 17 HARV. L. REV. 494.

HUSBAND AND WIFE — VOLUNTARY ANTENUPTIAL CONVEYANCES. — The defendant held title to land under a voluntary conveyance from his father, not recorded until after the second marriage of the father. This deed was made with intent to defeat the marital rights of any one the father might thereafter marry. *Held*, that equity will give the grantor's widow dower and homestead in the premises, even though at the time of conveyance she and the deceased grantor were strangers. *Higgins* v. *Higgins*, 76 N. E. Rep. 86 (Ill.). See NOTES, p. 459.

INSURANCE — CONSTRUCTION OF PARTICULAR PHRASES IN STANDARD FORMS — INCONTESTABILITY. — An insurance contract contained the following clause: "This policy is incontestable from date of issue for any cause, except non-payment of premiums." The insurance company had, however, actually relied on the representations of the insured at the time of issuing the policy. *Held*, that in an action on the policy the company is not debarred from the defense of fraud. *Reagan* v. *Union Mutual Life Ins. Co.*, 76 N. E. Rep. 217 (Mass.).

It is a well-recognized doctrine that a clause in an insurance policy providing for incontestability after a reasonable lapse of time will debar the insurer

after the lapse of such time from setting up fraud as a defense in an action on the policy. *Wright* v. *Mutual, etc., Ass'n*, 118 N. Y. 237. By this doctrine such a clause is regarded as analogous to the statutes of limitations, and supportable on the same grounds. But when the clause provides for immediate incontestability, and the insurer nevertheless relies on the false representations of the insured, to the latter's knowledge, it seems clearly against public policy to give effect to the provision. *Cf. Welch* v. *Union Central Life Insurance Co.*, 108 Ia. 224. The court, however, explicitly disclaims any intention of passing upon the availability of the defense in a case where, though there were fraudulent representations in fact, yet the contract was not induced by reliance upon such representations, but by an investigation conducted by the defendant.

MARRIAGE — VALIDITY — EFFECT OF SECURING DIVORCE FROM PRIOR HUSBAND AFTER REMARRIAGE. — The plaintiff, *bona fide* though erroneously believing her former husband dead, went through the form of marriage with the defendant. Later, merely as a matter of precaution, she secured a divorce from her former husband, and for many years continued to cohabit with the defendant as his wife. In a suit for support, brought by the wife, the defendant relied on the absence of a lawful marriage. *Held*, that the plaintiff became the lawful wife of the defendant after the divorce. *Chamberlain* v. *Chamberlain*, 62 Atl. Rep. 680 (N. J., Eq.).

When a man and a woman have lived together illicitly, a presumption arises that their subsequent relations continue illicit, and this presumption may be overcome only by proof of a later express contract for lawful marriage. *Appeal of Reading Fire Ins. Co.*, 113 Pa. St. 204. The analogy would seem complete between this class of cases and those involving a relation impossible of valid consummation because of some legal, though unknown, impediment. No such express contract could probably be found in the present case, as the parties would naturally rely upon the supposedly binding marriage, rather than upon any theory of a common law marriage after the divorce. *Cf. Holabird* v. *Atl. Ins. Co.*, 2 Dill. (U. S. C. C.) 166 n. This reasoning thus results in giving a morally innocent relation no greater effect than an obliquitous one. The present decision, in recognizing the marriage, reaches a desirable result without developing the reasons therefor. Such a result is obtainable by arbitrarily eliminating the presumption of a continuing illegality in the relation on account of the moral innocence of the parties, or by invoking the doctrine of estoppel. *Cf. Foster* v. *Hawley*, 8 Hun (N. Y.) 68; *Chamberlain* v. *Chamberlain*, 59 Atl. Rep. 813.

PLEDGES — DUTY OF PLEDGEE TO SELL — REQUEST BY PLEDGOR. — In answer to a suit on a note the defendant alleged that upon the maturity of the note he had requested the plaintiff to sell the shares of stock pledged with the plaintiff as security, and that the stock, if then sold, would have been sufficient to pay all claims of the plaintiff upon the note. *Held*, that this is a good defense. *Bank of Pittsburgh* v. *Porter*, 36 Pittsb. Leg. J. 169 (Pa., C. P. No. 3, Allegheny Co., Nov. 25, 1905).

It is more commonly said, there being one or two holdings and several *dicta* to this effect, that a pledgee is under no duty to sell the pledge at the request of the pledgor. *Cooper* v. *Simpson*, 41 Minn. 46; *Mueller* v. *Nichols*, 50 Ill. App. 663. Yet it seems desirable to hold that by his acceptance of the pledge the pledgee becomes bound to sell it at the request of the pledgor, the principal debt being due, provided that the market value of the pledge exceeds the principal debt. *Cf. Moore* v. *Brooks*, 2 Pa. Co. Ct. 619; see *Richardson* v. *Insurance Co.*, 27 Gratt. (Va.) 749, 753. In cases where the market value of the pledge is less than the principal debt, the pledgee should not be subjected to any duty to sell at the pledgor's request, since the pledgee, too, has an interest in the pledge, and should not be deprived of the chance of an increase in the value of his security. But the moment the value of the pledge exceeds the amount of his debt, he no longer has any interest to serve in not selling the pledge, and therefore should not be

allowed needlessly to embarrass a pledgor who is unable to redeem by subjecting him to the risk, often the certainty, of depreciation of the pledge. *Cf.* STORY, BAILMENTS § 320.

POLICE POWER — PUBLIC SERVICE AGENCIES — PUBLIC PLACES OF AMUSEMENT. — A statute made it unlawful to exclude from a public place of amusement any one who demands admission with a ticket acquired by purchase. The plaintiff was excluded from the defendant's race track, although he had complied with all the requirements of the statute. The defendant contended that the statute was unconstitutional. *Held*, that it is constitutional. *Greenberg* v. *Western Turf Ass'n*, 82 Pac. Rep. 684 (Cal.).

The extent of the power of the state to impose upon businesses the duties and obligations of public service companies is very ill-defined. It seems to be clearly settled that the police power will justify the classification of virtual monopolies among public service industries. *Munn* v. *Illinois*, 94 U. S. 113. The Supreme Court has also sustained a statute imposing a maximum charge to be made by grain warehousemen, although there was no monopoly in the warehousing business. *Brass* v. *North Dakota ex rel. Stoeser*, 153 U. S. 391. It seems impossible to tell upon just what principle this last case was decided. A leading text-writer maintains that even after this decision the power of the state does not extend to all industries, but that it is limited to a regulation of businesses essential to industrial welfare. FREUND, POLICE POWER § 378. Obviously under this definition of the power of the state, public amusements cannot be subjected to regulation as public service companies. See TIEDEMAN, POLICE POWER 232; *contra*, COOLEY, TORTS 285. The decisions sustaining statutes aimed against discrimination against negroes afford no support to the principal case, since the constitutionality of such statutes is based upon the public policy opposed to race discrimination.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — AGREEMENTS COLLATERAL TO SALES. — A steamship company operating on the Ohio River sold its boats to another river company, agreeing not to compete with the latter company for five years. Business between Ohio and probably Kentucky ports was contemplated. *Held*, that such an agreement, though touching interstate commerce, is not within the Sherman Act. *Cincinnati, etc., Packet Co.* v. *Bay*, U. S. Sup. Ct., Jan. 2, 1906.

Although the Supreme Court has repeatedly declared that the Sherman Act extends to all restraints of trade, even reasonable, it had let fall observations indicating that it did not consider the collateral agreement of a vendor of a business to withdraw from competition as obnoxious to the Act. *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 329; *U. S.* v. *Joint Traffic Ass'n*, 171 U. S. 505, 567. Acting on the suggestion, a New York court held valid a restrictive agreement connected with the sale of the good will of a coast-trade packet company. *Brett* v. *Ebel*, 29 N. Y. App. Div. 256; see 12 HARV. L. REV. 129. A later case in a federal court tends in the same direction. See *Davis* v. *A. Booth & Co.*, 131 Fed. Rep. 31. The present decision is therefore an affirmation of the distinction made in these cases; but the principle upon which it is founded seems far from clear. The lower federal courts have upheld restrictions imposed by a vendor upon the sale of his goods. *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 454; see also 17 HARV. L. REV. 480. And the Supreme Court has similarly allowed restrictions on the licensee of a patent right. *Brement* v. *National Harrow Co.*, 186 U. S. 70. All such contracts undoubtedly tend to restrain trade; and as the exceptions to the strict doctrine of the Supreme Court multiply, its qualified application will probably come to effect substantially the same results as a construction that applies the Act only to unreasonable restraints. See *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 360.

SALES — RIGHTS AND REMEDIES OF SELLER — EQUITABLE LIEN FOR PURCHASE PRICE. — The plaintiff's mother by her will left to him a legacy of the equitable reversionary interest in £5000, the prior life interest being in his

father. who held the legal title to the fund as sole trustee of the legacy. The plaintiff assigned his reversionary interest to his father for the sum of £1500. After the father's death, the plaintiff claimed against the father's estate a lien on the legacy for the purchase price and interest, as unpaid vendor. *Held*, that the lien was maintainable, as the doctrine of vendor's equitable lien is not limited to realty. *Stucley* v. *Kekewich*, 93 L. T. R. 718 (Eng., Ct. App., Nov. 7, 1905).

The vendor's equitable lien for the purchase price of real estate is looked upon, in this country at least, with increasing disfavor, and, except under the peculiar doctrine of Louisiana, there seems to be no authority here for extending it beyond interests in realty. *Cf. Sharp* v. *Kerns*, 2 Gratt. (Va.) 348; *Flint* v. *Rawlings*, 20 La. Ann. 557. In England, also, the lien is in general confined to realty and chattels real. See *Mackreth* v. *Symmons*, 15 Ves. Jun. 329, 343. The court in the present case relies upon a former English decision which is distinguishable on the ground that the subject-matter, though not realty, was the sum to be derived from the sale of leaseholds, a point emphasized by the only judge relying upon the doctrine of vendor's lien. *Davies* v. *Thomas*, L. R. [1900] 2 Ch. 462. A case relied upon in *Davies* v. *Thomas* is also distinguishable on the ground that the chose in action was not reduced to the possession of the purchaser. *Collins* v. *Collins*, 31 Beav. 346. In the present case the fund had actually come into the hands of the purchaser, as he himself was trustee of the fund. Accordingly there seems to be little authority for making this extension of a principle which in its present scope is of doubtful expediency.

SPECIFIC PERFORMANCE — LEGAL CONSEQUENCES OF RIGHT TO SPECIFIC PERFORMANCE — CONTRACT TO DISPOSE OF ESTATE AFTER DEATH. — The defendant furnished the decedent with maintenance on condition that all the decedent's property should descend to and belong to him at the decedent's death. After the death the defendant took possession of all the property, which consisted of a sum of money, and paid the funeral expenses. The administrator sued for the balance of the fund, without alleging that there were other creditors of the estate. *Held*, that he cannot recover, as the defendant is the equitable owner of the money. *Koslowski* v. *Newman*, 105 N. W. Rep. 295 (Neb.).

A man may validly bind himself or his estate to dispose of his property in a particular way. *Sutton* v. *Hayden*, 62 Mo. 101. The contract will be specifically performed after the death of the promisor if the property is realty. *Emery* v. *Darling*, 50 Oh. St. 160. If there are both realty and personalty, specific performance is granted as to both. *Schutt* v. *Missionary Society*, 41 N. J. Eq. 115. Equity assumes jurisdiction because realty is involved, and the whole case is then settled in one proceeding. But when the property is all personalty, as in the present case, no more reason for specific performance exists than in any other contract for the delivery of personalty. There is an adequate remedy by a suit at law, the measure of damages being the value of the property. *Wellington* v. *Apthorp*, 145 Mass. 69. The statement in the case that the defendant was the equitable owner with a right to specific performance is not supported by authority. The citations by the court are either *dicta* or cases involving both realty and personalty. The decision may be explained, however, on the ground of avoiding circuity of action. Although the administrator had a right to recover the money, it was useless to permit him to exercise it, as the defendant had a legal claim against the estate for the full value of the property, and there were no other creditors to be paid from the fund.

TAXATION — PARTICULAR FORMS OF TAXATION — THE NEW YORK STOCK TRANSFER TAX. — A New York statute imposed "on all sales, or agreements to sell, or memoranda of sales or deliveries or transfer of shares or certificates of stock in any domestic or foreign . . . corporation . . . on each one hundred dollars of face value or fraction thereof," a tax of two cents. *Held*, that the tax is constitutional. *People ex rel. Hatch* v. *Reardon*, 34 N. Y. L. J. 1457 (N. Y., Sup. Ct., Jan. 1906). See NOTES, p. 460.

TORTS — NEGLIGENCE — LIABILITY OF TELEGRAPH COMPANY IN TORT TO ADDRESSEE. — The defendant having delivered to the plaintiff a telegram incorrectly transmitted, the latter brings this action of tort to recover for the loss occasioned thereby. The defendant insisted that it owed the plaintiff no duty; that it had been guilty of no negligence; and that by the terms under which the message had been received from the sender, of which the plaintiff had notice, it had restricted its liability. *Held*, that a duty to take reasonable care to transmit messages correctly is imposed on the defendant company by law; that proof that the message was incorrectly transmitted raises a presumption of negligence on the part of the defendant which throws on it the burden of proving its own due care and that the defendant cannot limit its liability to the addressee in the manner claimed. *First National Bank* v. *Western Union Tel. Co.*, 34 N. Y. L. J. 1475 (N. Y., Municipal Court, Jan., 1906).

England allows the addressee no action for mere negligence. *Playford* v. *United Kingdom, etc., Tel. Co.*, L. R. 4 Q. B. 706. By the weight of American authority, a telegraph company, having accepted a dispatch, owes to the addressee a duty to take reasonable care to transmit it correctly, and is liable to him in tort for damages sustained through a breach thereof. *Western Union Tel. Co.* v. *Dubois*, 128 Ill. 248. It seems also that proof that the dispatch was incorrectly transmitted raises a presumption that the company has been negligent, and throws upon it the burden of proving its own due care. *Reed* v. *Western Union Tel. Co.*, 135 Mo. 661; *contra*, *Ellis* v. *American Tel. Co.*, 13 Allen (Mass.) 226. As to the measure of damages there is great confusion. Some authorities hold that since the duty to the addressee arises by reason of the contract, the conditions of that duty are defined by the contract, at least where the addressee had notice of the limitations. See *Ellis* v. *American Tel. Co.*, *supra*. But the better view seems to be that a liability in tort imposed by law cannot be restricted by mere notice of an agreement to which the addressee is not a party. *New York, etc., Tel. Co.*, v. *Dryburg*, 35 Pa. St. 298.

TORTS — NUISANCE — PRINTING MACHINERY IN DISTRICT DEVOTED TO PRINTING TRADE. — The plaintiff resided in a district almost entirely devoted to the printing trade. No appreciable disturbance, however, had been caused to the plaintiff at night. The defendant erected in a house adjoining the plaintiff's an improved modern printing machine which was run at night when necessary, and the noise from which caused considerable disturbance to the plaintiff. *Held*, that the injunction granted by the court below on the ground that the defendant is maintaining a nuisance will not be set aside. *Rushmer* v. *Polsue ad Alfieri*, [1906] 1 Ch. 234.

Every landowner has a legal right to have the air above his land free from such atmospheric vibrations, caused by an improper use of adjacent land, as produce in ordinary persons material bodily discomfort. The determination of what constitutes a reasonable and proper use of one's land depends on a weighing of the conflicting rights of a landowner to the undisturbed enjoyment of his property, of the neighbor to carry on suitable and useful occupations, and of the public to have industrial development unhampered by positive law. The English courts seem inclined to over-emphasize the first of these rights in comparison with the other two. See *Bamford* v. *Turnley*, 3 B. & S. 62; but *cf.* *Christie* v. *Davey*, [1893] 1 Ch. 316. The question to be answered on the particular facts of each case is this: is the disturbance to the plaintiff's person or property such as he ought to acquiesce in as one of the unavoidable inconveniences of living in society? Obviously, then, a useful occupation which would constitute a nuisance in a residential district might not be unlawful in another locality largely devoted to that occupation. Cf. *Gilbert* v. *Showerman*, 2 Mich. N. P. 158; *Robinson* v. *Baugh*, 31 Mich. 290. In the present case the lower court seemed to recognize this distinction in the rules of law; and while the upper court refused to set aside the injunction granted below, it expressed the opinion that it would have decided differently on the facts.

USURY — NATURE AND VALIDITY OF USURIOUS CONTRACT — WHETHER CONTRACT UNENFORCEABLE FOR USURY IS CURED BY ESTOPPEL. — A gave

B, his client to whom he was indebted, his promissory note at full legal interest, together with usurious security, and assured B that the transaction was all right. In an action on the note, brought by an assignee of B with notice of the usury, A set up the defense of usury. *Held*, that the plaintiff can recover on the note, as the representation by A to B, though as to a question of law, operates like a representation of fact where there is a confidential relation between the parties, and A is therefore estopped to assert his defense. *Hungerford Co.* v. *Brigham*, 95 N. Y. Supp. 867. See NOTES, p. 454.

WATERS AND WATERCOURSES — APPROPRIATION — EXTENT OF RIGHT FOR PURPOSE OF IRRIGATION. — An owner of lands in Nevada contiguous to a non-navigable stream sought to restrain an upper riparian owner of lands in California from diverting the water for irrigation. The court assumed that the land through which the stream flowed belonged originally to the federal government, and that before the defendant's predecessor in title had settled, the plaintiff's predecessor had appropriated for irrigation a quantity of water equal to the entire flow during the dry season. *Held*, that the defendants may be enjoined only from diverting the water for more than five of every ten days during the dry season. *Anderson* v. *Bassman*, 140 Fed. Rep. 14 (Circ. Ct., N. D., Cal.).

One who has by priority of possession acquired rights under the law of a state to the water of a stream flowing through public lands, is protected in them as against subsequent grantees of the federal government, even though the lands later granted lie in a different state. U. S. Rev. Stat. §§ 2339, 2340; *Howell* v. *Johnson*, 89 Fed. Rep. 556. Hence the principal case raises no question in the conflict of laws. The plaintiff as against the defendant is entitled to such rights as have accrued under the law of Nevada. By this law an owner by prior appropriation gains a paramount right to the quantity of water which he has appropriated to a beneficial use. See *Reno Smelting, etc., Works* v. *Stevenson*, 20 Nev. 269; *Bliss* v. *Grayson*, 24 Nev. 422, 456. The California decisions adopt the common law rule of reasonable user, that a riparian owner can at any time take for irrigation only his proportionate share determined by the number of other riparian owners applying the water to an equally beneficial use. See *Lux* v. *Haggin*, 69 Cal. 255, 311, 397; *Union Mill, etc., Co.* v. *Dangberg*, 81 Fed. Rep. 73, 93. The present decision holds that the rights under the laws of the two states are identical and enforces the California rule. Such an interpretation of the Nevada law is questionable, and finds explanation only in the desire to curtail the doctrine of appropriation so as to permit irrigation of the largest possible area.

WILLS — CONSTRUCTION — RESTRAINTS ON ALIENATION IN DEVISES TO MARRIED WOMEN. — Land was devised to the plaintiff, a married woman, for her separate use, with the provision that if she should sell the land the proceeds must be invested in other real estate and the purchaser must see to such reinvestment, and until then title should not pass, nor should anything bar or estop the plaintiff from recovering or retaining the land devised. The plaintiff conveyed the land to the defendant, but there was no reinvestment of the proceeds in real estate. *Held*, that no title passed, and the plaintiff may recover the land. *Bell* v. *Bair*, 89 S. W. Rep. 732 (Ky.).

Apart from the provision under discussion, the words of this devise appear, through legal construction and the operation of state statutes, to give the plaintiff the fee as a separate estate. See 4 MICH. L. REV. 292 (but *cf. Ball* v. *Hancock's Adm'r*, 82 Ky. 107, as to whether the fee here is base). The present question, however, would seem to be the same in legal effect, were there a life estate. While restraints on the alienation of estates in fee, for life, or probably for years are generally void, there is a well-recognized exception in the case of the separate estates of married women. See GRAY, RESTRAINTS ON ALIENATION, 2d ed., §§ 140–142, 125–126 a, 269–278 a. The alienation of such estates may be absolutely restrained, unless possibly a married woman cannot be prevented from transferring a fee, subject to her right to receive the income during her life. See GRAY, RESTRAINTS ON ALIENATION, 2d ed., § 126. Even this

concession would not prevent a conveyance, purporting to transfer unconditionally the whole fee, from being void. If, then, the settlor may prevent absolutely a purchaser of such estate from obtaining title, it seems to follow that he may impose a condition precedent to alienation, the happening of which is necessary before the purchaser obtains title. The Kentucky court here follows a previous decision on the same will to this effect. *Cf. Bell* v. *Mitchell*, 17 Ky. Law Rep. 1334.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

SPECIFIC PERFORMANCE OF NEGATIVE AGREEMENTS IN AFFIRMATIVE CONTRACTS. — An attempt in a recent article to define more narrowly the limits of equity's jurisdiction in the enforcement of negative clauses in affirmative agreements involves the elimination of the doctrine for which the leading case of Lumley *v.* Wagner (1 De G., M. & G. 604) stands. *Specific Performance by Injunction*, by Clarence D. Ashley, 6 Columbia L. Rev. 82 (Feb., 1906). The position is taken that if equity cannot directly bring about a complete performance of the contract, it should never intervene to compel part performance only. In the view of the writer, this rule would not prevent an injunction issuing in cases of contracts of which the negative part alone remained to be performed; of contracts of which the affirmative part, though executory, was capable of enforcement; or of contracts in which the affirmative agreement, though executory and unenforceable, was on the way to fulfilment. It would, however, prevent relief on the negative side whenever an affirmative, unenforceable contract was also broken. It is contended that the earlier cases support this distinction, and that Lord St. Leonards in Lumley *v.* Wagner misunderstood them; but the present interpretation of these authorities is too strained to be conclusive. On principle, two arguments are developed in support of the proposition presented. It is said, in the first place, that equity in enforcing a negative agreement which is connected with an unperformed, unenforceable affirmative clause, is attempting to do indirectly what it has denied its power to do directly. Undoubtedly one effect is a moral suasion of the defendant to perform the rest of his contract; but, for instance, where he has covenanted not to serve any one other than the plaintiff, he has his choice also of remaining idle or of going into some other occupation. Nor is the possible indirect result that for which the injunction is sought; rather is it the prevention of affirmative harm to the plaintiff, which the employment by a rival of the plaintiff's great prima donna, for example, would effect, irrespective of the breach of the affirmative agreement. In the second place, Dean Ashley claims that injustice is likely to flow from granting part performance when the obligation as a whole is unenforceable. To clinch his point, the writer cites Montague *v.* Flockton (L. R. 16 Eq. 189), in which a manager was allowed an injunction, although he had already incapacitated himself from performing by filling the defendant's place. Under the special circumstances the plaintiff had no equity, and the case is wrong in any view. But if there are situations where equity can aid without doing injustice, why should it not do so?

In England the trend is probably in the direction of Dean Ashley's proposition. See *Metropolitan, etc., Co.* v. *Ginder*, [1901] 2 Ch. 799, 805. In the United States, however, the tendency is to give partial relief, when complete enforcement is impossible, on the general equitable principles relating to the specific performance of other contracts. Even in the absence of express negative clauses, it is recognized that every contract contains an implied agreement to do nothing inconsistent with its completion, and when the breach of this implied restriction causes positive harm other than that resulting from the breach of the affirmative part alone, the usual test as to the inadequacy of the legal remedy